Operative Plasterers & Cement Masons, Local No. 299 (Wyoming Contractors Association, Inc.) *and* Jimmey Ray Hamilton. *Case* 27-CB-1425

September 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 20, 1981, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: I heard this case in Cheyenne, Wyoming, on August 26, 1980. It arose when Charging Party Jimmy Ray Hamilton (herein Hamilton) filed an unfair labor practice charge on February 28, 1980, with the Regional Director for Region 27 of the National Labor Relations Board (herein the Board) against Operative Plasterers & Cement Masons, Local No. 299 (herein the Union). On April 23, 1980, after an investigation, the Regional Director issued a complaint and notice of hearing against the Union alleging, in substance, that the Union operates an exclusive hiring hall by maintaining two referral lists which are "a sham and hav[e] no import with regard to referrals"; and that, since December 3, 1979, the Union has refused to refer Hamilton for work "because of arbitrary, unfair, and invidious reasons, and for reasons other than the employee's failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." The alleged maintenance by the Union of two referral lists which are a "sham" having "no import with regard to referrals" is characterized in the complaint as being violative of Section 8(b)(1)(A) of the National Labor Relations Act, which section prohibits labor organizations from "restraining or coercing" employees in the exercise of rights guaranteed in Section 7 of the Act. The alleged refusal to refer Hamilton to jobs since December 3, 1979, is characterized in the complaint as being violative of Section 8(b)(2) of the Act, which section prohibits labor organizations from "causing or attempting to cause an employer to discriminate against an employee in violation of subsection (a)(3)" (the latter subsection itself prohibiting discrimination by an employer "to encourage or discourage membership in any labor organization").

The charge and the complaint were duly served on the Union. The Union duly answered the complaint, admitting its status as a labor organization within the meaning of the Act and that its hiring hall served employers who were engaged in commerce within the meaning of the Act, but denying all substantive allegations of wrongdoing.

All parties were given full opportunity to appear at the hearing and to present evidence and arguments. Counsel for the General Counsel and counsel for the Union filed timely, written briefs after the hearing which I have carefully considered.

Upon the entire record, including my observations of the witnesses as they testified, and upon my assessment of probabilities, I reach the following:

I. FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS

A. *General Background*

The Union is chartered to represent employees in the plastering and cement finishing trade throughout Wyoming and a portion of western Nebraska. At the time of the hearing, the Union had between 130 and 150 members (all journeymen) scattered throughout its territorial jurisdiction, including about 50 in the Cheyenne area where the Union maintains its business office, and groups ranging in size from 10 to 20 in or near the other principal cities in Wyoming.

All of the Union's functions, including negotiation and policing of labor agreements, operation of its hiring hall, and related recordkeeping, bookkeeping, and other miscellaneous tasks, are performed exclusively by two persons: Business Agent Richard Gonzales and his wife, Sandra Gonzales. Richard is the chief executive officer. As a nominal "secretary," Sandra performs a large variety of ministerial, clerical, and bookkeeping tasks.

Richard is a journeyman cement mason who has held his current position as business agent for 7 years. He spends substantial portions of each week away from the Cheyenne office traveling throughout the Union's territory and handling the myriad tasks associated with representation of construction industry employees in a large,

but sparsely populated region which is undergoing something of an economic boom.[1] As a consequence of Richard's regular absences, many, if not most, of the day-to-day tasks performed out of the Cheyenne office, including administration of the hiring hall system, have been left, in fact, to Sandra.

B. *Pertinent Contractual Relationship*

The Union represents employees who perform both residential and commercial or "industrial" construction cement masonry work and it makes referrals to contractors engaged in both categories of work. We are here concerned with the admitted exclusive collective-bargaining relationship between the Union and certain employer-members of Wyoming Contractors Association, Inc. (herein called the Association).[2] They are currently parties to a statewide labor agreement having effective duration between July 1, 1979, and June 30, 1982.

That labor agreement contains these provisions pertinent to hiring and referral:

ARTICLE VI

HIRING PROCEDURE

SECTION 1.—FURNISHING OF WORKERS—The Employer agrees that he will give the Union the first opportunity to furnish and the Union agrees to furnish all classes of employment that are provided for in this Agreement. The Employer further agrees that all requests for workers will be placed with the Union dispatching office forty eight (48) hours preceding the day for which the Employer requests workers to be furnished. If the requested workers do not appear for work at the Employer's project at the hour requested, after such reasonable prior request for employees, the Employer shall be at liberty to hire from any source available the same number of workers so requested. The Union agrees not to dispatch workers involving travel and subsistence without approval by the Employer.

SECTION 2.—CANCELLATION OF ORDERS FOR WORKERS—If the Employer has placed an order with the Union for furnishing of workers at a certain beginning hour of employment at a particular time, he shall give notice of such cancellation to the Union dispatching office one (1) hour prior to reporting time on the work day for which such workers have been requested or at the time the Employer cancels his concrete order, whichever time first occurs.

SECTION 3.—QUALIFIED JOURNEYMEN—Contractors shall employ only qualified journeymen Cement Masons. A journeyman Cement Mason shall be qualified for employment who has had at least three years actual practical working experience as a Cement Mason, as a journeyman or apprentice, in the building and construction industry.

SECTION 4.—REGISTRATION—The Union shall establish and maintain open and nondiscriminatory employment lists for qualified applicants desiring employment on work covered by this Agreement and all qualified applicants shall be entitled to registration and dispatch free of charges. Every applicant shall be responsible for furnishing such data, records, names of employers and length of employment as may be deemed necessary. Applicants shall be registered in the order of time and date of registration on the appropriate out-of-work list.

SECTION 5.—NONDISCRIMINATORY SELECTION OF APPLICANTS—Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, Union membership, policies or requirements.

SECTION 6.—LIMITED PRIORITY OF REFERRAL AND HIRE FOR LOCAL JOURNEYMEN

(A) In the interest of providing an opportunity of employment for all qualified journeymen Cement Masons, while at the same time securing a fair distribution of employment for those journeymen who have had previous employment with contractors, parties to this Agreement or predecessor agreements, at all times during the progress of a job, fifty percent (50%) of the qualified journeymen Cement Masons employed by the contractor, plus the odd worker, if any, shall be "local journeymen." The remaining fifty percent (50%) of the work force may be "local" or nonlocal journeymen.

(B) A "local journeyman" is a qualified journeyman who has worked for a contractor or contractors at least one hundred eighty (180) working days out of the last three (3) years under the terms and conditions of this or predecessor agreements and who maintained residence of the past six (6) months within the state of Wyoming.

(C) Resident under this paragraph shall mean a person who has maintained his permanent home in the above defined geographical area for a period of not less than six (6) months or who, having had a permanent home in this area, temporarily left with the intention of returning to this area as his permanent home.

SECTION 7.—DISPATCH OF WORKERS—Upon request of a contractor for a Cement Mason,

[1] The record reflects, and I notice in any case, that Wyoming, like other western mountain States, has been the recent target of intensified exploration for and development of coal, oil, and uranium resources. Large-scale construction activities, including power plant construction, have been associated with this phenomenom.

[2] One of which members, as the parties agree in pleadings as amended at hearing, is Morrison-Knudsen Company, Inc. (herein called M-K), an Idaho-incorporated contractor doing business at material times in Wyoming which annually purchases and receives goods and materials valued in excess of $50,000 directly from outside Wyoming, and which is therefore involved in interstate commerce within the meaning of the Act. To the extent that other contractors are referred to in the record, it is presumed that they are likewise members of the Association, that they are likewise bound to the statewide agreement, and, therefore, that their participation in a multiemployer collective-bargaining unit which includes M-K warrants treating them as being likewise subject to the Board's jurisdiction. Accordingly, as to all complained-of aspects of the Union's operation of the exclusive hiring hall discussed below, the Board has jurisdiction to consider their legality.

the Union shall make referrals from the appropriate out-of-work list in the following order of preference:

(A) Where a contractor does not make a special request, as defined below, the first person referred except that, where the contractor making the request for journeymen has not employed the required fifty percent (50%) ratio of "local journeymen," then the first "local journeymen" on the list shall be referred until the required 50% ratio of "local journeymen" have been employed by the contractor.

(B) Where a contractor makes a special request for key workers, the request shall be honored. Special request for particular Cement Masons previously employed by a contractor making the request and who have been employed within one hundred fifty (150) days previous to the request shall also be honored, except that in both of the above cases where the journeyman request is not a "local journeyman" and the contractor making the request does not have the required ratio of "local journeymen," the request shall not be honored. The dispatcher shall dispatch persons possessing special skills and abilities in the order in which their names appear on the out-of-work list in accordance with the requirement that at least fifty (50%) of the journeymen on the job, plus the odd worker, are "local journeymen."

SECTION 8.—APPRENTICES

(A) When more than five (5) journeymen are required to be employed on a project for five (5) or more continuous days, the six (6th) worker hired by the employer shall be an apprentice, if available.

(B) If two (2) or more journeymen are used, the Employer, at his option may request the third (3rd) worker hired to be an apprentice if available.

SECTION 9.—LEGAL COMPLIANCE REGARDING APPLICANTS FOR EMPLOYMENT—The Union agrees to comply with all laws, regulations and relevant orders, state and federal, with regard to the acceptance, selection, classification and referral of applicants for Union membership and/or applicants for employment, without discrimination because of race, creed or national origin. The Union further agrees that it will provide the Employer with all information available to them to enable the Employer to comply with the foregoing statutes, orders and regulations, including the preparation and filing of such reports as may be necessary. The Union hereby agrees to indemnify and hold harmless the Employer from any losses or damages resulting from any act of the Union to comply with all the foregoing laws, statutes, orders and regulations, including court costs and attorney's fees authorized by the Union.

From the quoted section 1 above and from incidental evidence regarding the operation of the hiring and referral system, I conclude that the Union is the "exclusive" source for referrals to employer-members of the Association as that term is traditionally used in labor law.[3]

From the quoted sections 6 and 7 above, I conclude that the hiring and referral system described in the agreement lawfully[4] provides that preference in referrals be given to "local journeymen," as they are defined in the agreement.

From the quoted sections 6 and 7 above, and, more particularly, from sections 7(A) and (B), I conclude that the labor agreement grants to contractor-employers broad discretion in the selection of journeymen from the hiring hall list, subject only to the "50% local journeyman" requirement alluded to throughout sections 6 and 7. Thus, assuming that there are substantial members of journeymen awaiting referral from the hiring hall, a contractor-employer may, subject only to the "50% local journeymen" rule, virtually have his pick of employees, without regard to their relative placement on the hiring hall list or the length of time that they have been out of work.

C. *The Way the Hiring Hall Works in Fact*

The record contains much testimony from various witnesses about how the Union operates its hiring hall. Both Richard and Sandra testified at considerable length on the subject. Other witnesses (who were journeymen members of the Union) tended in their testimony to focus on specific instances in which, in their on-the-job capacities as supervisory agents of contractors, they called the Union for referrals to specific construction jobs. Some of the testimony is conflicting. Richard's testimony particularly contains seeming internal inconsistencies which are unnecessary to detail, since I place very little weight on his descriptions of the operation except insofar as they are corroborated by more reliable testimony concerning actual practices in specific instances.[5]

[3] See, e.g., *International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local Union No. 577 (Various Employers in Hannibal, Missouri Area)*, 199 NLRB 37, 42 (1972). This conclusion carries with it certain legal consequences discussed more fully below. One such consequence is that it gives rise to a duty of fair representation on the Union's part towards employees (including jobseekers) in the unit covered by the labor agreement. *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962). Another consequence is that Sec. 8(b)(2) of the Act—not merely Sec. 8(b)(1)(A)—is implicated by a failure of the Union for impermissible reasons to refer applicants for jobs in that unit. *Various Employers, supra.*

[4] The General Counsel does not in any manner attack the lawfulness of the hiring hall arrangement as it is described in the agreement and I therefore presume its legality. I note also that Sec. 8(f)(4) of the Act expressly permits a hiring hall agreement which "specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area." See also *Interstate Electric Co., et al.*, 227 NLRB 1991 (1977).

[5] A note on witness credibility: There are few disputes of any ultimate significance regarding facts of which more than one witness had firsthand knowledge. I have not fully credited any particular witness except as may be noted below. Richard and Sandra struck me as being essentially sincere and candid witnesses. Jimmey Ray Hamilton did not so impress me, nor did his wife, Krista. I have nevertheless given limited credence to some aspects of the testimony of each of those witnesses—in some cases crediting Jimmey Hamilton over Richard. As between Richard and Sandra's various descriptions regarding the operation of the hiring hall, I have largely ignored Richard's rather sweeping and internally inconsis-

Continued

The wealth of testimony about the hiring hall operation notwithstanding, there is no single body of testimony which systematically describes how it functions. From the mutually harmonious testimony of all of the witnesses, however, these general findings may be reached: At least until the investigation of Hamilton's charge took place, the Union maintained two "lists" within a single spiral notebook. These were called by Richard and Sandra the "A" and "B" lists.

The "A" list consisted of "local" journeymen; i.e., those who resided within Wyoming and who had established by on-the-job performance that they possessed customary skills associated with experience in a variety of residential and industrial cement masonry tasks.

The "B" list functioned largely as the repository for names of local journeymen who, due to injury, illness, or absence, were unavailable for referral. It was also used as the repository for names of jobseekers with whom the Union had no familiarity and who had not yet established competence in the trade to the Union's satisfaction.

As to individuals on the "B" list who were available for work but who had not established to the Union's satisfaction that they possessed the full range of journeyman skills, Richard and/or Sandra would nevertheless make an effort to refer them to jobs where the contractor-employer had not preempted the opportunity by making "by-name" requests and where the job in question appeared to be within their capabilities as reflected in the experience form which they were asked to complete when they first registered with the Union for referral.

Once a "B"-listed jobseeker was thus dispatched to a job of any substantial duration and the Union had received no complaints about his performance from his employer, he would be transferred to the "A" list (without apparent regard to his length of residency and/or his technical satisfaction of the terms "local journeyman" or "qualified journeyman" as they appear in the labor agreement). Thus, placement on the "A" list appears to reflect that the Union had been satisfied that those thus placed possessed at least minimum journeyman skills. Such individuals would thereafter be dispatched to jobs within their respective apparent skill ranges and where the contractor-employer had not preempted this possibility by filling his needs through "name" requests.

It must be recalled that Richard (and to some degree, Sandra, as well) were aware from their experience and familiarity with the relatively small membership of the ranges of job skills possessed by the individuals on the "A" list. Accordingly, it was frequently the case (when the contractor-employer left it to the Union to select a journeyman for referral) that judgments as to which person to refer were influenced by considerations of skill and experience more than the length of time an individual had been "on the bench" awaiting referral. Since not all jobs required special or unique skills, however, length of time on the bench controlled when several apparently qualified "A"-listees were available.

In considering whom to refer to a specific job call, the location of the job determined which pool of available registrants would be drawn on. Thus, the Union would look to Cheyenne-area registrants to fill a job call in that area even if there was a registrant residing in a more distant locality who had been out of work longer than all of the Cheyenne registrants.[6]

During the relatively short summer construction season, there have been—in recent times at least—job calls in sufficient numbers to keep the bench empty; i.e., not only "A"-listees were regularly referred out as soon as they completed an employment stint, but available "B"-listees as well. In some cases during the peak construction season, Richard would even call on persons whom he knew around the State who had never signed up for referral in order to fill contractors' requests for qualified help.

During the winter months, however (which is the period during which Charging Party Hamilton was allegedly wrongfully denied referral by the Union), the above description of the operation of the hiring hall becomes somewhat academic. For, during that relatively inactive construction period, there are numerous journeymen on the bench awaiting referral. Because of this, and because the labor agreement gives contractors broad discretion in making "name" selections, the Union plays a mostly passive role in the referral process. Thus, as Sandra credibly described the typical process during the winter of 1979–80, a contractor's agent will simply call, identify the job and number of persons he needs, ask: "Who's on the list?" and pick persons by name who are known to the hiring agent.

If the Union has any influence at all in this process, it is limited to making appeals on behalf of a given registrant or registrants on the bench to the effect: "So-and-so has been out of work for a long time and he's a pretty good man. How about taking him?"[7] I infer from the testimony of some of the journeymen called as witnesses for the Union that these appeals have some influence when they or their union member-counterparts with other contractors are acting in supervisory positions which allow them to make the job call to the Union.

D. *Hamilton's Difficulties*

Jimmey Ray Hamilton first appeared at the Cheyenne office of the Union in early September 1979. The record is vague as to when he had first become a resident of Wyoming. The only testimony on this subject was from his wife, Krista, who appeared to be confused, but who said that she and her husband had first lived in Cheyenne from "May or June, 1979 to March, 1980," but who also said that they lived in Wheatland "from May, 1979 towards the end of May, 1980." I find that the Hamiltons

tent statements in favor of Sandra's more systematic descriptions of its actual operation. Sandra had greater day-to-day familiarity with and responsibility for the operation of the hiring hall.

[6] This practice is seemingly authorized by the labor agreement which at sec. 1 quoted above prohibits the Union, absent the contractor's agreement, from dispatching workers where "travel and subsistence" is required (the labor agreement elsewhere provides for travel and subsistence premiums to be paid to workers dispatched from a remote "dispatch point").

[7] Another variation (adapted from Richard's testimony): "So-and-so needs more worktime in order to qualify for unemployment benefits. Can you use him?"

first came to Wyoming in May 1979, living first for a brief period in Cheyenne, then later in Wheatland throughout the period with which we are concerned.[8]

Hamilton had come from a variety of academic and work pursuits in the Eastern United States. In the final year before moving to Wyoming, Hamilton had been employed as a journalist with a newspaper in Virginia and had been attending school part time. For some time before that, he had been pursuing a college degree in mass communications. In the preceding 5 years, he had also been in college, and had also driven a truck, and had worked several short-term residential jobs for cement contractors. Before then, he had been in the United States Air Force for 5-1/2 years. At best, his experience in cement masonry work had been intermittent and on a "moonlighting" basis for the period of about 5 years immediately before his move to Wyoming. Neither had it included work in anything but the most routine, residential masonry jobs (e.g., patio, sidewalk, and driveway work).[9]

When Hamilton and his wife first appeared at the Union's hall in Cheyenne in September 1979, he introduced himself to Richard, who asked him several questions about his background and experience. Crediting Hamilton, Hamilton told Richard, *inter alia*, that he did not have much heavy construction experience (in fact, on this record, he had not had any such experience). Richard gave Hamilton an experience form to complete.[10] On this form, Richard checked 8 of 18 specific types of typical masonry work described therein.[11] The boxes checked by Hamilton included only routine tasks.

Hamilton also listed two employers whom he had worked for in the space calling for cement work experience in the past "3 years." Here, Hamilton represented that he had worked for "2-1/2 years" for a Virginia construction firm doing "block laying";[12] and "1 year" for a Cheyenne contractor doing "footers and foundations."[13]

Hamilton's wife further recalled that Richard told her husband during their first meeting that when the Union sent him to a job Hamilton would have to furnish his own tools. When Hamilton asked about the payment of union dues, Richard told him that the Union permitted "a reasonable amount of time for somebody coming in new to pay . . . dues."

There was no specific discussion about which "list" Hamilton's name would be placed on. Consistent with the practice earlier described, however, Richard admittedly entered Hamilton's name on the "B" list, reflecting that Hamilton's qualifications were not yet personally known to Richard. This did not prejudice Hamilton. Within about 2 weeks, Richard dispatched Hamilton to a job, but Hamilton could not respond because of a foot injury. Shortly afterwards, Richard again dispatched him to a job but, upon Hamilton's arrival, the foreman said there had been a mistake and no one was needed. Hamilton called Richard from the site and Richard promised to "straighten it out." Richard again dispatched Hamilton on October 22 to a job with Morrison-Knudsen at the Laramie River Power Station near Wheatland. Richard worked at this job until he was laid off during a reduction in force on November 29.[14]

After his layoff, on or about December 3, Hamilton notified the Union that he was out of work. What happened thereafter between Hamilton and Sandra and Richard is in substantial dispute, although everyone agrees that Hamilton received no further dispatches until after he filed the charge with the Board in February 1980.

Summarizing Hamilton's testimony (as well as that of his wife, who figured in some of the exchanges reported below): Hamilton (or his wife) made numerous contacts by telephone or in person with either Sandra or Richard. Prior to about mid-February 1980, Hamilton would periodically inquire about work possibilities and he would be told by Richard or Sandra that there were a given number of persons "on the list" and Hamilton would be given vague estimates as to how long it would be before he could be dispatched.[15]

At least twice during this period, crediting the Hamiltons, Hamilton asked "if it would help" to pay union dues and initiation fees. Each time Richard said that it would "not make any difference as far as [Hamilton's] placement on the list." In each case, Richard told Hamilton that he would not have to pay dues or fees until he got back to work, and, then, that he should pay them as soon as he was able to.

Hamilton's wife testified further that in about mid-February,[16] she called Sandra, who told her that Hamilton was "Number 2 on the list." Shortly afterward, on or about February 19, Hamilton learned that some men had been dispatched to a 1-day job with a construction firm called "Centric." He testified that he then called the

[8] To the extent that the duration of Hamilton's residence in Wyoming is relevant to a determination of what referral category he was entitled to, I conceive it to have been the General Counsel's burden to show, if he contended that Hamilton was entitled to "local journeyman" treatment, exactly how long Hamilton had been a Wyoming resident. Having made a confused record on this point, the General Counsel is not entitled to a finding that Hamilton had been a resident of Wyoming for more than 6 months prior to his first registration with the Union.

[9] From these, and from other findings below, it is clear that Hamilton did not possess "journeyman" skills in cement masonry as the term is ordinarily understood, and that, in any case, he would not have satisfied the test set forth in the labor agreement at art. VI, sec. 3, which requires "at least 3 years actual practical working experience as a Cement Mason, as a journeyman or apprentice, in the building and construction industry." At best, crediting Hamilton's estimate solely for present purposes he had worked a lifetime total of 300 days as a cement mason before arriving at the Union's hiring hall. As of the time of the hearing herein, he still did not know what a "screed" was (i.e., a temporary form or leveling device used in virtually every type of foundation, sidewalk, or driveway pour).

[10] Resp. Exh. 1.

[11] Respondent's witness Eddie Vijil credibly testified that a "qualified journeyman" should have experience in all of the 18 typical job tasks set forth on the Union's experience form.

[12] In fact, as his cited testimony shows, he did not work anything near "2-1/2 years" for a single Virginia masonry contractor.

[13] Since I have found that Hamilton first arrived in Cheyenne in May 1979, this entry was plainly an exaggeration. In addition, as he testified, albeit vaguely, his work for the Cheyenne contractor was "on and off," and did not add up to a full year's experience.

[14] Neither Hamilton's charge nor the complaint attacks the Union's treatment of Hamilton prior to December 1979. I therefore assume that Hamilton was accorded regular and lawful treatment in dispatch during the above-described September to December 1979 period.

[15] This general testimony is not in dispute and I therefore credit it.

[16] Hamilton's wife said it was in "late February," but context shows that the conversation next reported was before February 19, 1981.

Union's Cheyenne office and spoke with Richard. Hamilton recalls Richard explaining that Hamilton had not been sent to the Centric job because Hamilton was "Number 1 on the 'B' list," but that there were about 20 persons on the "A" list who would have referral priority. According to Hamilton, Richard explained that the "A" list was "for guys that he knew well and had been masons in the local for a long time and ones that had made their book," and that the "B" list "was for guys he didn't know very well and had not paid their dues." Hamilton states that Richard then told him that if a job came up that none of the "A"-listees wanted Richard would send Hamilton out on it.[17]

Upon hearing for the first time that he was on something called the "B" list, Hamilton testified, he went to the Cheyenne office personally and spoke with Sandra. She told him that Richard was not in and that he should address his complaint to Richard. Hamilton also described a conversation with Sandra which he said occurred the next day, but which more probably took place during their face-to-face meeting. Here, according to Hamilton, Sandra told him that there were "some drunks and unreliables" on the "A" list and that he would be called before them. When Hamilton asked about the 1-day Centric job to which several persons had been dispatched, Sandra told him that they had been sent because they had been requested "by name." Hamilton expressed disbelief that "every contractor in the State of Wyoming was asking for people by name." Sandra replied to the effect that many of the tradesmen were not working.

The next day, Hamilton recalled vaguely, he called Richard, who acted "annoyed" and "pretty much told me not to call him, that he would call me." Believing by then that he was being given a runaround, Hamilton made an angry call to the office of the secretary of the Wyoming AFL-CIO, Keith Henning. Crediting Carol Fowles, Henning's secretary, and, discrediting Hamilton as to any discrepancies (based on the demeanor of the respective witnesses), Hamilton angrily and profanely complained that he was being treated unfairly by the Union and also threatened to hire a lawyer and to call a press conference if he did not hear from Henning (who was out of the office at the time). Fowles telephoned the Union and reported to Sandra what Hamilton had done. Sandra so informed Richard. Hamilton never made personal contact with Henning.

On or about February 22, Richard telephoned Hamilton. Their conversation is disputed. Hamilton's wife listened in on an extension phone. Richard's recollection of the conversation was poor and he was uneasy and evasive in testifying on the subject. I credit mostly Hamilton and his wife in these composite findings: Richard angrily called Hamilton a "fucking sonofabitch" for complaining to Henning's office. Richard complained that he had been "busting [his] ass to get [Hamilton] a job." Hamilton made some reference to "getting" Richard through a lawyer and vowed that Richard would "pay for his house and his family." Richard said that he would "get" Hamilton or would have someone "get" him. Richard made a suggestion that the two meet the next day. Hamilton declined. Richard said that his proposal was to meet to discuss their differences and that he wanted to explain to Hamilton why Hamilton had not been dispatched. Hamilton thought Richard was challenging him to fight. The conversation ended inconclusively.

Some concluding findings are required regarding the events up to this point. I have already made some limited adverse credibility resolutions regarding the Hamiltons' accounts of these events but, in general, they are not disputed. The only additional material dispute that I can detect is that Sandra emphatically denied, as the Hamiltons contended, that Sandra ever told Hamilton or his wife that Hamilton occupied a specific position "on the list." Sandra was especially emphatic in denying that she had ever said, in mid-February, that Hamilton was "Number 2 on the list." I credit Sandra as to these denials. Given the nature of the hiring hall operation in the winter months, it is doubtful that anyone could know with certainty when a referral applicant's "number" would come up. Also, as a matter of policy, Sandra testified credibly, she would not disclose this information but, instead, would only tell a caller that there were a certain number of persons awaiting referral. I conclude that Sandra imparted no more than the latter type of information when the Hamiltons called in the period before mid-February. I further conclude that Sandra never told Hamilton's wife that he was "Number 2" or any other specific "number."

As to why Hamilton had not been dispatched between his layoff from M-K on November 29, 1979, to February 28, 1980, when he filed the instant charge, I make the following findings: Hamilton's stay on the M-K job was marked by poor performance. Crediting the testimony of foreman Eddie Vijil, who was in charge of a crew numbering up to 12 men, Hamilton showed up on the job without a set of tools. Vijil loaned him some tools which he used thereafter.[18]

Vijil also testified that Hamilton was regularly tardy in arriving for work and that he missed several days of work. Hamilton does not dispute that his attendance was less than constant. Vijil, corroborated by fellow M-K employee James Abeyta, testified credibly that Hamilton showed little or no knowledge of the industrial cement construction techniques being used on the power plant project for which M-K was responsible. Vijil states that he and other crewmembers were required to teach Hamilton the basic techniques. When it came time to reduce the work force, crediting Vijil, the job superintendent in-

[17] Richard's testimony about this conversation was vague and I therefore credit Hamilton, except for his seemingly embellished recollection that Richard made reference to payment of dues as being a criterion for referral priority. The record elsewhere shows that his dues payment status was not influential in Hamilton's treatment by the Union. Since Richard had not accepted Hamilton's earlier offer to pay dues, I conclude that Richard did not tell Hamilton anything to the effect that dues payments would enhance his referral prospects.

[18] Hamilton admits that he did not have tools on his first day, but he states that he brought his own tools thereafter for the balance of the 5 weeks he was on the M-K job. I credit Vijil, even allowing for the possibility that Hamilton brought some additional tools of his own after the first day. Vijil was credible in his demeanor and had no stake in the outcome. Sandra credibly testified that sometime during the period of Hamilton's 5 weeks at M-K, the hiring agent, "Mike," complained to her: "What are you doing sending me turkeys with no tools?"

structed Vijil to include Hamilton in the layoff due, primarily, to his recent poor attendance.[19]

Sandra testified that Hamilton was still considered eligible for referral notwithstanding his marginal background and the poor report on him from M-K. She and Richard agree that Richard told her not to count the one bad report from M-K against him. I so find. It is evident, however, that, until the charge herein was investigated, the Union was treating Hamilton as a non-"local journeyman" and that his name was being carried on the Union's "B" list. For obvious reasons, this made it less likely that he would be referred to any given job call for a journeyman than would someone being carried on the "A" list.

Sandra systematically reviewed every dispatch made from the hall in the pre-March 1980 period and suggested reasons in each case why Hamilton was not referred. Most of these were either geographically inappropriate or resulted from "name" requests. As to a few, she claims from vague recollection that she tried to call Hamilton at home but received no answer. I credit her, particularly as to the "by name" and "geographic inappropriateness" reasons.[20] There was no showing to the contrary as to these alleged reasons and Sandra appeared to be sincere. In addition, the only dispatch which the General Counsel seemed to challenge was the one in mid-February to Centric's job near Wheatland. As to that job, Foreman Gallegos substantially corroborated Sandra that he selected the men to be dispatched after Sandra named the persons on the list. Neither Gallegos nor Sandra specifically recalled whether Hamilton's name was offered for Gallegos' consideration.

After Hamilton filed the instant charge on February 28, 1980, an investigating agent for the Board met with Sandra and Richard in March. He told them something at the time about the "A" and "B" lists which caused them to conclude that maintaining separate lists was unlawful and that they should consolidate those lists. Thereafter, Hamilton's name was carried on the newly consolidated list. Crediting Sandra, she thereafter "bent over backward" to find dispatches for Hamilton. He was dispatched to a job with Hansel-Phelps in Sweetwater on March 17, but he did not answer the dispatch due to difficulties with his truck. Sandra credibly recalled, however, that she had prearranged with another Wheatland dispatchee to drive Hamilton to and from the site but that Hamilton had refused this arrangement. She further credibly recalled that Hamilton called the Cheyenne hall 2 hours after he had been due to appear for work to say that his truck problems made it impossible for him to take the dispatch. Hamilton does not deny these details and I credit Sandra.

Sandra again dispatched Hamilton to a 1-day job with M-K on March 25 and he accepted that job.[21] Thereafter, he received no further dispatches in the month of April 1980. Again, as she had done for the earlier period, Sandra attempted systematically to recall why Hamilton did not receive any of the dispatches in April 1980. Again, taking the dispatches one-by-one, she reported that they were either geographically inappropriate for Hamilton, or were filled by "name" selections from the "local journeymen" list, or she had tried to telephone Hamilton to dispatch him and received no answer. Again, I credit her testimony as to the geographic inappropriateness and "name" reasons, but retain doubts about the accuracy, but not the sincerity, of the "no-answer" reason.

By May 1, 1980, Hamilton had moved his family to a new location and had not communicated this fact to the Union, nor left a forwarding address or telephone number. On May 15, the Union mailed a certified letter to Hamilton at his last-known Wheatland address. The letter stated, *inter alia*:

> We have tried several times the past two weeks to reach you by phone at the number you gave us. . . . That number is no longer in service.
>
> So that you will not miss any more opportunities for work, please advise this office of a phone number where you can be reached.

Hamilton's wife somehow learned of the letter and signed the receipt for it on May 21. Hamilton made no further effort to make contact with the Union until, he says, sometime in June. Hamilton described the ensuing conversation which, in the absence of contrary evidence, I credit, as follows: Hamilton asked Richard, "What the situation was." Richard replied: "I really don't owe you anything." Hamilton asked: "What about work up around Cody?" Richard replied: "There might be something in six months." Hamilton said: "That's what I thought," and hung up. Hamilton admittedly did not inform Richard of his current whereabouts. There was no further communication between Hamilton and the Union.

[19] In March, after Hamilton filed the charge, the Union dispatched him again to a 1-day job with M-K over the protest of M-K's hiring agent. Sandra credibly testified that she wished to avoid further charges by Hamilton of discrimination against him. She further told M-K's agent that unless M-K formally requested in writing that Hamilton not be dispatched he would be referred for future calls. On April 15, the Union received a letter from M-K's business manager (Resp. Exh. 3) stating that Hamilton was "less than a marginal employee," that he did not possess necessary tools and displayed "little or none of the qualities expected of a journeyman cement mason," that his absence and tardiness record was poor and required shifting of personnel to "cover" for him, and, finally, "[i]f Mr. Hamilton is again referred to Morrison-Knudsen without his tools, he will be terminated on the spot and directed to return to the hall."

[20] As to the "no-answer" reason, I retain some doubts. While Hamilton and his wife acknowledged that they could not be certain that someone was always at home to answer the telephone, neither was Sandra completely sure in those few "no-answer" instances that this was the real reason. Rather her testimony was in the hypothetical mood (i.e., "I'm sure I would have called him for this job"). I believe that Sandra was sincere in attempting to recall what had happened, but that she had no distinct recollection. Therefore, the accuracy of her testimony here is in question.

[21] It was after this second dispatch to M-K that M-K reported by letter dated April 15 to the Union that Hamilton was "less than marginal" and did not possess necessary tools (see fn. 19, *supra*). Hamilton denied that this was the case from the witness stand but, for the balance of April, the Union had no information to contradict the letter from M-K. And, as is set forth below, on May 1, Hamilton disappeared from his former residence at Wheatland and the Union had no way thereafter to reach him.

E. *Factual Conclusions Regarding Alleged Bypassing of Hamilton*

Reserving for later consideration the question of the lawfulness of the Union's treatment of Hamilton, I draw these summary conclusions from the foregoing findings and from the record as a whole about why Hamilton did not work more regularly during the period in question.

First, the period with which I concern myself is the period after Hamilton's initial layoff from M-K at the end of November 1979 through April 1980. The General Counsel has virtually conceded in remarks made during the hearing as well as by his failure to deal with the point on brief that Hamilton's disappearance on and after May 1, 1980, absolved the Union from any further responsibility to seek him out for job referrals. I would so conclude in any case. Hamilton's inconclusive conversation with Richard in June was not enough to trigger on the Union's part some new duty to treat him as a job applicant—especially when Hamilton did not disclose how he might be reached by the Union if a referral possibility were to arise.

Concerning that relevant period (winter 1979–80), I find, in summary, as follows: Hamilton had failed to satisfy the Union by any reasonable means that he was entitled to registration as a "local journeyman." While the Union did not appear to be concerned about the 6-month residency test for qualifying as "local," it had ample grounds for doubting that he was a "journeyman."[22] His initial placement on the "B" list in September was not challenged by the complaint and I must take this as a concession by the General Counsel that there was nothing inherently violative of Hamilton's rights in the Union's having made this initial classification judgment.[23]

When Hamilton was continued on the "B" list after his initial layoff from M-K, the Union thereby indicated its continuing doubts as to his qualifications as a journeyman. It was this placement judgment which contributed heavily to his failure to be called for jobs in the ensuing period before he filed his charge with the Board. While the Union did not completely remove him from consideration for further referrals, I find that the Union made no effort to "push" him when contractors called for qualified help. I am satisfied that this was based solely on the Union's judgment that he was not qualified for most, if not all, of the jobs which were called into the hiring hall.[24]

I do not find it to be suggestive of any ulterior purpose that Sandra was not convincing in her vague recollection that she attempted without success to telephone Hamilton for some of the referrals during the period in question. Whether she even had a duty to seek out Hamilton for journeyman referrals under the circumstances is doubtful. For the moment, it suffices to observe that her inability to recall the particular circumstances of every dispatch made throughout that period was understandable.[25] Far from being an indicator of bad faith, Sandra's willingness to concede that there were jobs for which she would have treated Hamilton as qualified suggests candor on her part and a good-faith desire to treat him fairly.

In any case, the existence of numerous out-of-work "local journeymen" whose qualifications were known to the Union virtually precluded the possibility that Hamilton would be referred. This was because contractors generally exercised their contractual right to select referrals "by name" and because, in cases where the Union had some opening to use its own discretion, there were always others available whom the Union could conscientiously refer as being "qualified."

I might infer from the fact that the Union somehow managed to find two jobs in March 1980 for Hamilton that it had been intentionally refusing to consider him for referrals during the preceding period. I do not so infer. Rather, I am satisfied that Hamilton's charge to the Board caused the Union to double its efforts—not because Richard and Sandra had somehow come to view Hamilton's qualifications in a more favorable light, but only in an effort to avoid any appearance of discrimination and to get the Government off its back.[26] To this extent, therefore, they were giving him extraordinary treatment.

II. LEGAL ANALYSIS AND CONCLUSIONS

The complaint was tightly focused. It alleges that the Union's maintenance of two lists was a "sham" which had "no import" to the referral process; and, therefore, that such a dual list system amounted to a *per se* violation of Section 8(b)(1)(A). It further alleged that the Union violated Section 8(b)(2) of the Act by failing to dispatch Hamilton after December 3, 1979, "because of arbitrary, unfair, and invidious reasons, and for reasons *other than* [Hamilton's] failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership in [the Union."] (Emphasis supplied.)

[22] Not only was his professed background in the trade at best facially marginal, but he had also affirmatively demonstrated on the M-K job that he was unprepared to perform the variety of tasks associated with possession of "journeyman" skills.

[23] It was also, in my opinion, an entirely reasonable judgment for the Union to make given his marginal background even as he professed it, and given the Union's contractual duty to refer only "qualified" journeymen.

[24] Put another way, I am satisfied from the utter absence in the record of any contrary indications that the Union was not prompted by hostile considerations based either on Hamilton's lack of union membership or on some personality conflict.

[25] The absence of systematic and fully business like records of registration and referrals was likewise understandable and did not constitute evidence that Hamilton was being treated irregularly. The Union was the labor organization counterpart of a mom-and-pop business. Sandra was beleaguered by the numerous tasks which fell to her to handle in Richard's frequent business absences. The somewhat sorry state of Respondent's records was, therefore, merely the product of the circumstances. It is not, *per se*, a violation of the Act for a union to maintain poor records—or none at all. *Local 394, Laborers International Union of North America, AFL-CIO (Building Contractors Association of New Jersey)*, 247 NLRB 97, fn. 2 (1980).

[26] There is ample evidence that Hamilton's call to Henning's office at the Wyoming AFL-CIO triggered Richard's resentment. Notwithstanding that, there is affirmative evidence that the Union, for the reasons noted, increased its efforts to find jobs for Hamilton. It is also likely that Richard and Sandra do not feel warmly towards Hamilton for having filed the Board charges (including for his assertion therein—itself unfounded on this record—that "Richard takes care of his fellow Mexicans [sic] first"). Again, the record suggests that, this likely ill-will notwithstanding, the Union sought harder than ever to find jobs for him.

As to the former allegation, I find it to be meritless. As I have found above, the labor agreement itself lawfully provided for referral priorities for employees seeking employment in the unit which it covered. Briefly, summarized, it authorized a system whereby at least 50 percent of the referrals to any given employer be "local journeymen." It further established specific, objective, and lawful, criteria for determining whether a jobseeker was entitled to be regarded as, first, a "journeyman," and second, as "local." It further required that duly registered journeymen who resided in a given area be given priority for referrals to jobs in that area, in order to minimize the chances that employers would incur travel and subsistence expenses associated with the dispatch of persons from a more remote dispatch point.

The General Counsel has never identified exactly what it is about the "A" and "B" list system used by the Union which was "sham" and which had "no import" to the referral process. Neither has the General Counsel suggested how the Union's dual list system, *per se*, serves any improper purpose. Indeed, the General Counsel has simply abandoned that allegation in his brief. I am therefore left at a loss to determine at what, if anything, that cryptic allegation was directed.

That allegation must fall in any case. While the contract did not specifically call for the maintenance of "A" and "B" lists of the type that the Union employed, I have no difficulty in finding that those dual lists served an important purpose in aiding the Union in determining whether or not to send a given registrant to a given job.

I have found that the principal significance of the dual lists for purposes of this case is that they established two categories of registrants—those that had satisfactorily demonstrated that they possessed journeyman skills and those that had not. Plainly, therefore, they had relevance to the most basic requirement in the contract that only "qualified journeymen" be referred. Incidentally, both lists contained a registrant's residence address, telephone number, and last date of employment—likewise information needed by the Union to apply the various contractual requirements outlined above pertaining to referral. Thus, they were neither "sham" nor irrelevant to the referral operation from those standpoints either. And, contrary to the occasional and inconclusive intimations by the General Counsel, placing a jobseeker's name on the "B" list was not tantamount to throwing it in the trash. Hamilton's own experience in being referred from the "B" list wholly precludes that interpretation. A "B"-listee simply had fewer practical chances to be nominated by the Union or selected by an employer for jobs—especially during the winter months, when the bench was full of qualified journeymen, and "local" ones at that, who were entitled to at least 50 percent of the jobs even before other qualified journeymen could be reached.

Accordingly, there was nothing inherently "sham" or unlawful *per se*[27] about the Union's maintenance of the two lists, and the complaint allegation under discussion must therefore be dismissed.

Addressing the second, and principal, allegation of the complaint, that pertaining to the failure of the Union to dispatch Hamilton since December 3, 1979, some preliminary observations are in order: First, the language chosen in the complaint—that the Union was motivated by "arbitrary, unfair, and invidious reasons" and by reasons other than Hamilton's failure to satisfy certain membership requirements—clearly invokes a "fair representation" theory of violation under *Miranda, supra*. While the "fair representation" phrase encompasses a variety of potentially unlawful practices, the only thing that may be said for certain is that it rules out any claim that the Union was merely discriminating against Hamilton because he was not a member of the Union or had failed in some other way to satisfy membership requirements.[28]

It is therefore most remarkable to me that the first argument suggested by the General Counsel on brief is that Hamilton was the victim of discrimination because he was not a member of the Union. The General Counsel here relies on certain general testimony of Richard in which he described the "A" list as being comprised of "members" of the Union.[29]

I reject this contention *pro forma*. If the prosecution's complaint was intended to challenge an alleged practice by the Union of giving low priority in referrals to Hamilton or other persons who had not satisfied "membership" requirements, then the General Counsel certainly knew how to plead that theory; and, for the reasons noted, it expressly ruled such a theory out of the case by the language which it chose. It is simply too late at the briefing stage for the General Counsel to advance a theory of violation which was never fairly encompassed by the pleadings, which thereby failed to satisfy even minimal due process "notice" requirements, and which thereby precluded the possibility of full litigation of the theory.[30]

I also reject it on its merits. The record elsewhere shows that the Union was not anxious about, or resentful of, Hamilton's failure to join the Union or pay dues to it. Richard repeatedly assured Hamilton that he need not pay dues or initiation fees to the Union until he had received sufficient work referrals to afford it and he further expressly disabused Hamilton of any notion that he might get referred sooner if he tendered such dues or fees. Rather, as I have elsewhere concluded, it was the Union's judgment that Hamilton was not a fully qualified journeyman which had an adverse impact on his referral opportunities.

Having identified the Union's decision not to treat Hamilton as a fully qualified "local journeyman" as the only basis for an argument that the Union did something

[27] The lawfulness of the Union's choice to place Hamilton on the "B" list is, of course, a separate question, which I address below.

[28] Were there any lingering doubt on the point, the complaint clause which asserts that the Union was motivated by reasons "other than" his failure to satisfy uniform membership requirements conclusively rules out any theory of discrimination based on lack of union "membership."

[29] Richard elsewhere stated, however, that nonmembers had likewise been placed on the "A" list.

[30] *Camay Drilling Company*, 254 NLRB 239, fn. 9 (1981).

to him which tended to impair[31] his chances for more job referrals than he actually received in the winter of 1979–80, it remains to determine whether the Union so acted in derogation of its obligations under the Act. I have noted the *prima facie* applicability of the *Miranda* fair representation doctrine to the Union's relationship with Hamilton. *Miranda* teaches that, where, as here, a labor organization enjoys status as the exclusive collective-bargaining representative of a unit of employees, it owes a duty which is statutory in origin to refrain "from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[32] The *Miranda* majority took pains, however, to echo the view of Justice Harlan in Local 357[33] that "the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees."[34]

I note, moreover, the Board's holding in *Operating Engineers, Local 18*,[35] that a legal presumption of unlawful "encouragement of membership" in violation of Section 8(b)(2) of the Act flows from the mere proof that a union has taken action to have an employee discharged or to "prevent" his hire, and that the burden then shifts to the union to show that its actions were somehow necessary to the effective performance of its representation of its constituency. (*Ibid.*)

When read together, these cases establish not only that a union may not take action impairing a represented employee's job tenure or prospects based on arbitrary, unfair, irrelevant, or invidious considerations, but also that the union bears the practical affirmative burden of justifying virtually any such "impairment" action by showing that its action was taken to fulfill its overriding duty to represent the legitimate interests of its constituency.

I have found that the Union did "impair" Hamilton's job referral prospects by treating him at all times material herein as something less than a broadly-qualified "local journeyman"—with emphasis on the "journeyman" portion of the phrase. The question which is therefore raised is whether the Union's actions in this regard were done in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its constituency as a whole.

I answer this question affirmatively. Control over and regulation of the hiring process through the operation of exclusive hiring halls is the—common and perhaps essential—means through which unions in the building and construction industry may effectively represent employees in that industry.[36] But, in order to achieve that exclusive hiring hall status with construction industry employers, some *quid pro quo* is usually required. As herein, it usually takes the form of contractual requirement that the union furnish only "qualified" help. Thus, when a union seeks, in the interests of its constituency as a whole, to have initial influence in the regularizing and decasualization of the hiring process through the operation of an exclusive hiring hall, it must have credibility with employers as being a reliable source for the furnishing of trained and experienced personnel. And, while it is true that the Union's primary purpose is not so much to act as a "screening" agency for employers as it is to ensure that its constituents get their fair share of work opportunities under controlled conditions, a union necessarily must employ reasonable eligibility standards in selecting applicants for referral. If it fails to do so and uncritically refers individuals to jobs without regard to their qualifications for the work, it ceases to have any real value to employers in the industry and thereby undermines its own proper interest in playing a central role in the hiring process.

Accordingly, it is beyond doubt that a union may use reasonable judgment in determining whether to send a given individual to a given job. This is so without regard to the presence or absence of specific, additional "qualifications" restrictions which may be inserted into labor agreements providing for exclusive hiring halls. Especially where, as here, a union has lawfully committed itself by contract to make classification judgments relating to a jobseeker's qualifications, it is an unmistakable part of a union's effective performance of its representative function to avoid referring individuals who do not satisfy the contractual prerequisites for referral.

I have found that the Union's judgment as to Hamilton's lack of journeyman skills was the only reason why Hamilton was not included in the "A" or priority referral group. There is a total absence of evidence of any bad-faith or hostile considerations on Richard's or Sandra's part in making this judgment. I have further concluded that this judgment was not based on arbitrary, whimsical, or irrelevant considerations. Rather, it was genuinely based on objective indications that Hamilton's background experience was marginal (i.e., Hamilton's own "experience" form—itself exaggerated) and further on objective indications that he was a substandard performer on the initial M-K job (i.e., reports from M-K's agent that Hamilton was a "turkey" without journeyman's tools, and reports from its own member, Vijil, that Hamilton had no grasp of even basic industrial cement masonry techniques).

Significantly, the General Counsel has never directly urged that Hamilton was objectively entitled to classification as a "local journeyman," although such a premise would appear to be implicit in his attack on the Union's treatment of Hamilton. Thus, the General Counsel never undertook, as part of his *prima facie* presentation, to show that Hamilton had fulfilled either the "residency" or the "experience" requirements for treatment as a "local journeyman."[37] As I have noted above, there is

[31] It bears repeating that the decision by the Union to treat Hamilton as something less than a fully qualified journeyman only had the tendency to impair Hamilton's referral chances. It has not been demonstrated that, but for this decision, Hamilton would have been referred to any particular job during the period in question.

[32] 140 NLRB at 185.

[33] *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] v. *N.L.R.B.*, 365 U.S. 667, 681–682 (1961).

[34] 140 NLRB at 187.

[35] *International Union of Operating Engineers, Local 18, AFL–CIO (William F. Murphy)*, 204 NLRB 681 (1973).

[36] *Local 357*, 365 U.S. at 672–674.

[37] To the extent that there is evidence in the record bearing on either of those questions, it was adduced primarily by the Union's counsel.

evidence warranting the conclusion that Hamilton had not been a Colorado resident for a full 6 months before registering in September 1979, even though the Union does not seem to have been influenced by this consideration. There is also evidence warranting the conclusion that Hamilton possessed neither the "3 years" of "actual practical" experience required for treatment as a "journeyman," nor sufficiently varied experience in the range of work commonly performed by cement masons. The fact that Hamilton did not know even by the time of hearing what a "screed" was strongly shows, as I find, that even his claimed experience was an exaggeration and that, as the Union eventually concluded, he barely possessed even minimal background and experience in the trade.

Accordingly, even if it was not the General Counsel's threshhold burden (and I think it was) to show that Hamilton was entitled to classification as a "journeyman" or "local journeyman" (depending on the theory of violation),[38] I have found that the overall record establishes that he was not entitled to either such classification and that it was not "arbitrary" for the Union to have made the same judgment.

Additional (Nonalleged) Theories Urged by the General Counsel

As I have done regarding the General Counsel's untimely and unlitigated contention that Hamilton was discriminated against because he was not a "member" of the Union, I likewise reject, *pro forma*, these additional theories and arguments in the General Counsel's brief which were never fairly encompassed by the two substantive allegations in the complaint and which therefore were never fully litigated:

1. The contention that some (unidentified) section of the Act was violated by Richard's failure to tell Hamilton that the Union maintained two lists.[39]

Alternatively, on the merits, it is clear that, until on or about February 19, 1980, when Hamilton angrily pressed Richard and Sandra regarding why he had not been dispatched for some time, the details of the Union's operation of its referral system had never been discussed. The subject simply had not come up. However, the Union's referral records and its spiral notebook containing the "A" and "B" lists were maintained in the Cheyenne office and were freely available for inspection, crediting Sandra's uncontradicted testimony on the point. It is also undisputed that the Union never refused any request by Hamilton to make information pertaining to his job prospects available to him. For these reasons, *Local No. 324, Internatinal Union of Operating Engineers, AFL-CIO (Michigan Chapter, Associated General Contractors of America, Inc.)*, 226 NLRB 587 (1976), cited by the General Counsel, is utterly inapposite.

2. The contention that the Union's "conduct is clearly inconsistent with and contrary to the . . . agreement's hiring hall provisions," and is thus unlawfully "arbitrary."[40]

Alternatively, I reject this contention on the merits. The General Counsel has failed to identify precisely which "conduct" by the Union and which "hiring hall provisions" he is talking about. In the absence of some specific challenge, it suffices to note that I have elsewhere found and concluded above that the Union's referral practice insofar as they affected Hamilton were based on nondiscriminatory and rational considerations and were seemingly harmonious with the provisions of the labor agreement.

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Union's operation of its exclusive hiring hall pursuant to its current labor agreement with the Association implicates employers who are in commerce within the meaning of Section 2(6) and (7) of the Act and therefore the Board has jurisdiction over the complained-of actions of the Union herein.

3. The Union did not, by its complained-of actions, violate any provisions of the Act.

4. To the extent that it has been or may be argued that conduct by the Union other than that challenged by the complaint also violated the Act, those theories were never fairly encompassed by the complaint and the facts underlying them were not fully litigated; and, accordingly, they must be rejected, *pro forma*. Alternatively, they are not supported by a preponderance of credible evidence in the record as a whole.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, I hereby issue this recommended:

ORDER[41]

The complaint is dismissed in its entirety.

[38] It is arguable, under a literal reading of the burden-of-proof analysis suggested in *Operating Engineers, Local 18, supra*, that all the General Counsel need show, *prima facie*, is that a union took action which impaired an employee's job tenure or prospects, and that the burden then shifts to the Union to demonstrate that its actions were necessary as part of its representative function. But, in a hiring hall case, it seems to me that the General Counsel should bear an additional *prima facie* burden of showing that the alleged victim of wrongful treatment was at least apparently eligible for referral in whatever category may be applicable. Put another way, it is contrary to practical experience for there to be a presumption that anyone who registers for referral with a union-operated hiring hall is entitled to referral from a priority category; and, therefore, the Union's defensive burden should not be imposed unless and until some showing has been made by the General Counsel that an employee was apparently qualified for, but did not receive, a particular job dispatch. Such a clearly imposed *prima facie* burden would assist the General Counsel in focusing his investigation of charges pertaining to hiring hall violations and would avoid hearings such as the one herein where, ultimately, it is not seriously disputed that the alleged discriminatee failed to satisfy legitimate and objective qualifications for referral as a "journeyman."

[39] G.C. Br., p. 5.

[40] *Ibid.*

[41] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.